



[6705-01-P]

FARM CREDIT ADMINISTRATION

12 CFR Part 630

RIN 3052-AC77

Disclosure to Investors in System-wide and Consolidated Bank Debt Obligations of the Farm Credit System; System Audit Committee

AGENCY: Farm Credit Administration.

ACTION: Final rule.

SUMMARY: The Farm Credit Administration (FCA, us, we, or our) amends our regulations related to the Federal Farm Credit Banks Funding Corporation (Funding Corporation) System Audit Committee (SAC) and the Farm Credit System (System) annual report to investors. The final rule removes the provision for a two-thirds majority vote of the Funding Corporation board of directors to deny a request for resources by the SAC and requires the SAC to use resources to preserve and promote the safety and soundness of the System. The rule also requires quarterly reporting by the SAC to the Funding Corporation board and annual reporting to investors on resources used.

DATES: This regulation will be effective 30 days after publication in the Federal Register during which either or

both Houses of Congress are in session. We will publish a notice of the effective date in the Federal Register.

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION:

I. Objectives

The objectives of this final rule are to:

- Allow the SAC unrestricted access to resources to engage legal counsel, consultants and outside advisors; and
- Clarify that the SAC must have the agreement of the Funding Corporation board of directors in order to appoint, compensate, and retain the external auditor of the combined System-wide reports.

II. Background

The Farm Credit Act of 1971, as amended (Act),¹ authorizes the FCA to issue regulations implementing the

¹ Pub. L. 92-181, 85 Stat. 583 (1971), 12 U.S.C. 2001 et seq.

Act's provisions.² Our regulations are intended to ensure the safe and sound operations of System institutions and to govern the disclosure of financial information to shareholders of, and investors in, the System. Section 630.6(a) of our existing regulations requires the Funding Corporation to establish and maintain the SAC, including providing monetary and nonmonetary resources for SAC operations. Our existing regulation requires a two-thirds vote of the full Funding Corporation board to deny any SAC request for resources.

In a May 2010 petition, the SAC requested that we amend § 630.6(a) to allow the SAC the unfettered ability to engage outside advisors, consultants and legal counsel in the performance of its duties. In a February 14, 2012, proposed rulemaking, we proposed:

- Removing the requirement that the Funding Corporation Board deny a SAC request for resources by a two-thirds majority vote of the full board;
- The SAC use resources in a manner that would not adversely affect the safety and soundness of the System; and

² 12 U.S.C. 2252(a)(8), (9) and (10).

- Disclosure of resources used by, and the composition of, the SAC.³

The 60-day comment period for the proposed rule closed on April 16, 2012.

III. Comments and Our Responses

We received comment letters on the proposed rule from each of the four Farm Credit banks, the Farm Credit Council (Council) on behalf of its membership, and a joint letter from the Funding Corporation and the SAC (joint letter). The Farm Credit banks and the Council expressed support for the comments made in the joint letter. We discuss the comments to our proposed rule and our responses below. Unless otherwise discussed in this preamble, those areas of the proposed rule not receiving comment are finalized as proposed.

A. System Audit Committee Authority [§ 630.6(a)]

All commenters supported removing the requirement that a two-thirds majority vote of the full Funding Corporation board of directors was needed to deny a SAC request for resources. Also, commenters supported the requirement that the SAC report at least quarterly to the Funding Corporation board on its use of resources.

³ 77 FR 8179 (Feb. 14, 2012).

Commenters expressed concern with the requirement that the SAC use Funding Corporation resources in a manner that would not adversely affect the safety and soundness of the System. They stated that the safety and soundness provision was not operational and could be subject to different interpretations. One commenter provided an example in which the SAC may choose not to investigate or uncover potential financial wrongdoing because disclosing how it used the resources and the results from the use of those resources may impact the System's cost of funds in a manner that could adversely affect the safety and soundness of the System. The commenter noted that failure of the SAC to investigate or uncover a potential financial wrongdoing could also adversely affect the safety and soundness of the System. We respectfully disagree with comments arguing that the provision may not be operational when there may be a duty to disclose financial wrongdoing which might adversely affect the cost of funds for the System. Uncovering financial wrongdoing and any unavoidable impact would not be contrary to the rule. While the wrongdoing itself may affect safety and soundness, the corrective actions taken to respond to and resolve the wrongdoing would be a positive impact on the safety and soundness of the System and, therefore, not prohibited under the rule.

It is the financial wrongdoing that could adversely affect the safety and soundness of the System, not the action taken by the SAC to uncover and correct it.

Commenters stated that requiring the SAC to use Funding Corporation resources in a manner that would not adversely affect the safety and soundness of the System provision would create a standard that is stricter than that applied under governance best practices and should not be required. Some commenters expressed that holding the SAC to a stricter standard in the use of resources may hinder the Funding Corporation's ability to attract and retain SAC members, which could potentially damage the safety and soundness of the System. As the safety and soundness regulator of System institutions, including the Funding Corporation and its SAC, we expect all institutions to use resources according to law and regulations and in a safe and sound manner. We believe using resources accordingly and in such a manner should always be considered a best practice. Further, since the SAC is not composed solely of members of the board of directors as are other System institution audit committees,⁴ we want to be

⁴The SAC is only required to have one-third of its membership from the Funding Corporation board of directors. Audit committee members of Farm Credit banks and associations are composed solely of members of the respective institution's board of directors.

clear that the SAC is held to the same safety and soundness standard.

Commenters stated the SAC cannot guarantee that the use of resources would lead directly to results that ensure the safety and soundness of the System. One commenter noted that the requirement may discourage the SAC from engaging outside third parties to assist with investigations or prevent the SAC from seeking their advice. The rule does not require the SAC use of resources guarantee the System's safety and soundness. Instead, the rule requires that the SAC not use Funding Corporation resources in a manner that would adversely affect the safety and soundness of the System or be contrary to law and regulation. We refer again to the example in which the SAC would use resources to uncover financial wrongdoing. The actual act of financial wrongdoing may adversely affect the safety and soundness of the System. The use of resources by the SAC to uncover and correct the wrongdoing may not be considered to have caused the adverse effect, but may help preserve and promote the safety and soundness of the System.

The joint letter asserted that the SAC is already bound by its fiduciary duties to act prudently. The joint letter stated that the Business Judgment Rule allows SAC

members to rely on the advice of experts, but the safety and soundness provision would create a judicial and regulatory hindsight that the Business Judgment Rule was meant to deter. The commenter stated that this could potentially lead to a liability for SAC members.

The Business Judgment Rule provides a measure of liability protection to directors, officers, employees, and agents of a corporation when, in the course of decision-making, they place a reasonable reliance on expert advice. When applying the Business Judgment Rule, the courts consider whether the decision-making process involved careful consideration of reasonably available and relevant facts and whether the decision-maker honestly and reasonably believed that the decision was in the best interest of the institution. The safety and soundness of the System is in the best interest of the SAC and the Funding Corporation. We see nothing in the requirement to use Funding Corporation resources in a safe and sound manner that is contrary to the SAC's fiduciary duties or diminishes the protection offered the SAC under the "Business Judgment Rule." As such, the argument that the provision hinders or otherwise contradicts the principals behind the Business Judgment Rule is not meritorious.

The SAC's use of Funding Corporation resources must have the intended purpose of preserving or promoting the safety and soundness of the System. We do not believe that it is more difficult for the SAC to carry out its responsibilities in a manner that does not adversely affect the System's safety and soundness than it is for other System institution audit committees. However, in consideration of the comments, we are modifying the language to clarify the requirement. The provision as finalized places a positive duty on the SAC to use resources in a lawful manner and to preserve and promote the safety and soundness of the System. This provision does not prevent the Funding Corporation board from developing its own policies and procedures to address the request for and use of resources by the SAC.

B. External Auditors [§ 630.6(a)(4)(ii)(A)]

All commenters agreed with the proposed clarification that the SAC determines the appointment, compensation, and retention of the external auditor only with the agreement of the Funding Corporation board. However, commenters asked that the rule text make clear that this authority relates to the performance of the audit of the System-wide combined financial statements and not the audit fees related to the performance of the audit of the financial

statements of individuals banks and associations. We do not believe any changes are needed to the language in § 630.6(a)(4)(ii). The rule clearly states that the appointment, compensation and retention of the external auditors relates solely to issuing the combined System-wide audit report and not the audit report of individual banks and associations. Our rule at § 620.30(d)(2) gives that authority to the audit committees of individual banks and associations. In addition, in a 2006 rulemaking, we made changes to our rules to limit the authority of the Funding Corporation, and by extension the SAC, to intervene in the activities of any bank or association's external auditor.⁵

The joint letter requested that the rule not require Funding Corporation board concurrence for ordinary or recurring external auditor fees. We do not believe this change is necessary because, as previously stated, the Funding Corporation board may develop its own procedures to address the activities of the SAC as long as those procedures do not conflict with law or regulation.

We finalize the provisions of § 630.6(a)(4)(ii)(A) as proposed.

⁵ See 71 FR 76111, Dec. 20, 2006.

C. Disclosure of System Audit Committee Expenditures

[§ 630.20(n)]

We proposed in § 630.20(n) that Funding Corporation resources used by the SAC be disclosed by category and amount in the annual System-wide report to investors if the total of each expense category for the reporting year was \$5,000 or more. The proposed categories included, at a minimum, administrative expenses, contracted legal services, contracted consultants and advisors, and other contracted services performed on behalf of the SAC. We proposed excluding from this section disclosure of the fees paid to the external auditor for issuing System-wide audit reports. That disclosure is required by existing § 630.20(k)(2).

Commenters expressed concern with the additional disclosures proposed in § 630.20(n). Other commenters contended that the disclosure placed a higher standard on the SAC than what is required of entities registered with the Securities Exchange Commission (SEC) or as required by the Sarbanes-Oxley Act of 2002 (Sarbanes-Oxley).⁶ The joint

⁶ Pub. L. 107-204, July 30, 2002. Congress enacted Sarbanes-Oxley after revelation of accounting and financial management scandals involving public companies. It was enacted to strengthen financial disclosure, reporting, and accountability requirements for publicly traded companies and other entities registered with the SEC. Farm Credit

letter stated the disclosures were unnecessary and explained that as a best practice the SAC follows most SEC disclosure requirements, using a materiality assessment. Commenters suggested disclosures not be required before any investigation or similar inquiry by the SAC is completed. One commenter stated that the disclosures could reveal confidential information and might affect the ability of the SAC to engage outside consultants. The joint letter asserted attorney-client communications would also be compromised.

We believe disclosure of the use of Funding Corporation resources by the SAC provides transparency to System stockholders and investors and strengthens board and management accountability. Further, we believe removing the provision that a two-thirds majority vote of the full Funding Corporation board be required to deny an SAC request for resources necessitates an added level of accountability by the SAC.

We do not believe that disclosing the dollar amount of resources used to hire legal counsel, consultants and other categories of services would compromise confidentiality or attorney-client relations. The provision does not require

banks and associations are not subject to the governance requirements of Sarbanes-Oxley.

the disclosure in the annual System-wide report to investors of the name of or service performed by legal counsel, advisors or outside consultants engaged by the SAC. Instead, the provision requires reporting the cost of and benefits to the System from the use of those resources. However, since disclosure of benefits derived from using those resources appears to be the source of commenters' concerns, and considering the safety and soundness constraints placed on the use of resources, we are finalizing the rule with the cost disclosure only and without the requirement to report the benefits of resources used. We expect the SAC to disclose information on the benefit from the use of resources to the Funding Corporation board.

One commenter requested that we limit the definition of external resources to "experts" engaged by the SAC and not include resources used by the SAC for off-site meeting facilities. The commenter stated that the use of these resources should instead be periodically reported to the Funding Corporation board. We respectfully disagree with the suggestion of limiting the disclosure on the SAC's use of resources to only "experts." The Funding Corporation is required to provide both monetary and nonmonetary resources to the SAC and we proposed disclosures of those resources

to ensure that investors are provided transparent and complete disclosure on the use of resources by the SAC. Further, we identified categories of resources based on use, including a disclosure category of "administrative expenses," which may include either internal or external resources or both. Thus, if the SAC uses Funding Corporation resources for meeting sites, those expenses would be reported in the "administrative expense" category.

One commenter asserted that the \$5,000 de minimis reporting threshold was too low and should be increased. We believe this threshold is reasonable given we are removing the requirement for a two-thirds majority vote of the full Funding Corporation board to deny an SAC request for resources. In addition, the threshold resembles other disclosure thresholds contained elsewhere in our rules. We are not increasing the reporting threshold in this final rule.

One commenter requested that we clarify the relationship of the proposed § 630.20(n) exemption from reporting external audit fees for issuance of System-wide audit reports with the existing requirement of § 630.20(k)(2), which requires the disclosure of fees. Existing § 630.20(k)(2) requires disclosure of fees paid to the external auditor during the reporting period for audit

services, tax services, and non-audit services. Because § 630.20(k)(2) currently requires disclosure of these fees, we did not also propose requiring a similar disclosure requirement in § 630.20(n). We are revising the language in § 630.20(n) for clarity.

No comments were received on the proposed requirement to disclose in the annual System-wide report to investors the name, experience, and compensation of SAC members. Also, we received no comments on the categories of resources used by the SAC that were identified in the proposed rule and required to be disclosed. We finalize these provisions as proposed.

IV. Regulatory Flexibility Act

Pursuant to section 605(b) of the Regulatory Flexibility Act (5 U.S.C. 601 et seq.), the FCA hereby certifies that this final rule will not have a significant economic impact on a substantial number of small entities. Each of the banks in the Farm Credit System, considered together with its affiliated associations, has assets and annual income in excess of the amounts that would qualify them as small entities. Therefore, Farm Credit System institutions are not "small entities" as defined in the Regulatory Flexibility Act.

List of Subjects in 12 CFR Part 630

Accounting, Agriculture, Banks, banking, Organization and functions (Government agencies), Reporting and recordkeeping requirements, Rural areas.

For the reasons stated in the preamble, part 630 of chapter VI, title 12 of the Code of Federal Regulations is amended as follows:

PART 630—DISCLOSURE TO INVESTORS IN SYSTEM-WIDE AND CONSOLIDATED BANK DEBT OBLIGATIONS OF THE FARM CREDIT SYSTEM

1. The authority citation for part 630 is revised to read as follows:

Authority: Secs. 4.2, 4.9, 5.9, 5.17, 5.19 of the Farm Credit Act (12 U.S.C. 2153, 2160, 2243, 2252, 2254); sec. 424 of Pub. L. 100-233, 101 Stat. 1568, 1656; sec. 514 of Pub. L. 102-552, 106 Stat. 4102.

2. Section 630.6 is amended by revising paragraphs (a)(3) and (a)(4)(ii)(A) to read as follows:

§ 630.6 Funding Corporation committees.

(a) * * *

(3) Resources. The Funding Corporation must provide the SAC monetary and nonmonetary resources the SAC determines necessary to enable it to perform the duties listed in paragraph (a)(4) of this section. The Funding

Corporation must permit the SAC to contract, for reasons directly related to the duties listed in paragraph (a) (4) of this section, the services of external auditors, independent legal counsel, and outside advisors. The SAC must only use the resources of the Funding Corporation in a manner that complies with laws and regulations and for the purpose of preserving and promoting the safety and soundness of the System. The SAC must provide the Funding Corporation board of directors a quarterly accounting of expenditures made pursuant to this section.

(4) * * *

(ii) * * *

(A) Determine, with the agreement of the Funding Corporation board of directors, the appointment, compensation, and retention of the external auditors issuing System-wide audit reports;

* * * * *

3. Section 630.20 is amended by revising paragraph (n) to read as follows:

§ 630.20 Contents of the annual report to investors.

* * * * *

(n) System Audit Committee. The Funding Corporation must include in the System-wide Report to Investors a

description of the System Audit Committee and its activities during the reporting period. At a minimum, the description must:

(1) List the names of the System Audit Committee members, including each member's term of office and principal occupation during the past 5 years. For each member, state the total cash and noncash compensation paid for services on the System Audit Committee during the reporting period.

(2) Disclose by category the monetary and nonmonetary resources used by the System Audit Committee during the reporting period. Discuss only those categories where the resources used within a category equaled or exceeded a total aggregate value of \$5,000 during the reporting period. Fees paid for the audit of the System-wide financial statements, which are disclosed under paragraph (k)(2) of this section, are not included in any category under this paragraph. At a minimum, there must be separate categories for:

- (i) Administrative expenses,
- (ii) Contracted legal services,
- (iii) Contracted consultants and advisors, and
- (iv) Other contracted services, identifying the services.

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Date: _September 20, 2012_

Dale L. Aultman,
Secretary,
Farm Credit Administration Board.

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